

**ATTACHMENT 4**

*to the*

**DECLARATION OF EVA FETTIG  
ON BEHALF OF  
AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.**

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF THE ATTORNEY	)	CAUSE NO. PUD 970000560
GENERAL OF THE STATE OF	)	
OKLAHOMA, AT&T COMMUNICATIONS	)	
OF THE SOUTHWEST, INC., BROOKS	)	
FIBER COMMUNICATIONS OF TULSA,	)	
INC., COX OKLAHOMA TELCOM, INC.,	)	
MCI TELECOMMUNICATIONS	)	
CORPORATION, AND SPRINT	)	
COMMUNICATIONS, L.P. TO EXPLORE	)	ORDER NO. _____
SOUTHWESTERN BELL TELEPHONE	)	
COMPANY'S COMPLIANCE WITH	)	
SECTION 271(C) OF THE	)	
TELECOMMUNICATIONS ACT OF 1996	)	

**ORDER NUNC PRO TUNC REGARDING  
ORDER NO. 445180**

BY THE COMMISSION:

The Oklahoma Corporation Commission of the State of Oklahoma ("the Commission") being regularly in session and the undersigned Commissioners being present and participating, there comes on for deliberations, consideration and action, a question as to specific language of Order No. 445180 entered in Cause No. PUD 970000560. Pursuant to OAC165:5-17-4 of the Commission's rules of practice, the Commission issues an Order Nunc Pro Tunc herein. In support of this Order Nunc Pro Tunc, the following is stated:

1. That on September 28, 2000, the Commission issued Order No. 445180 in the above titled Cause.
2. That the following language contained in the Order is as follows:

On page 164:

"The Commission finds that AT&T's concerns have merit and directs that Southwestern Bell's Attachment 11 be replaced with the Attachment 11 proposed by AT&T as Attachment 3 to its Comments on the O2A (Ex. 60c). The Commission finds that this O2A provision, as amended, fully complies with the FCC's single point of interconnection requirement." <sup>30</sup>

On page 182:

"The current decision from the Texas line splitting decision in the AT&T arbitration should be adopted as interim terms, conditions and rates for line splitting in Oklahoma."

3. That the language as set out above in paragraph two, should be amended as follows:

On page 164:

"The Commission finds that the additional language proposed in SWBT's Sparks Rebuttal Test., referenced above, is consistent with the FCC's decision in the Texas Order and that Southwestern Bell need not make additional changes to Attachment 11. The Commission finds that this O2A provision, as amended in accordance with SWBT's Sparks Rebuttal Test., fully complies with the FCC's single point of interconnection requirement."<sup>30</sup>

On page 182:

"Additionally, the decision, when adopted by the Texas Public Utility Commission, from the Texas line splitting docket (AT&T arbitration, Texas PUC Docket No. 22315) should be adopted as interim terms, conditions and rates for line splitting in Oklahoma."

IT IS THEREFORE THE ORDER OF THE CORPORATION COMMISSION of the State of Oklahoma that Order No. 445180 issued in this Cause on September 28, 2000, shall be amended, nunc pro tunc as set forth herein, and all remaining provisions of Order No. 445180 shall remain in full force and effect.

CORPORATION COMMISSION OF OKALHOMA

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BOB ANTHONY, CHAIRMAN

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DENISE A. BODE, VICE-CHAIRMAN

---

ED APPLE, COMMISSIONER

DONE AND PERFORMED THIS \_\_\_\_ DAY OF OCTOBER, 2000, BY ORDER OF  
THE COMMISSION:

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PEGGY MITCHELL, SECRETARY

**ATTACHMENT 5**

*to the*

**DECLARATION OF EVA FETTIG  
ON BEHALF OF  
AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.**

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF THE ATTORNEY )  
GENERAL OF THE STATE OF )  
OKLAHOMA, AT&T COMMUNICATIONS )  
OF THE SOUTHWEST, INC., BROOKS )  
FIBER COMMUNICATIONS OF OKLAHOMA, )  
INC., BROOKS FIBER COMMUNICATIONS OF )  
TULSA, INC., COX OKLAHOMA TELCOM, )  
INC., MCI TELECOMMUNICATIONS )  
CORPORATION, AND SPRINT )  
COMMUNICATIONS, L.P. TO )  
EXPLORE SOUTHWESTERN BELL )  
TELEPHONE COMPANY'S COMPLIANCE )  
WITH SECTION 271(C) OF THE )  
TELECOMMUNICATIONS ACT OF 1996 )

**FILED**  
OCT 16 2000

COURT CLERK'S OFFICE - OKC  
CORPORATION COMMISSION  
OF OKLAHOMA

CAUSE NO. PUD 970000560

**AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.'S  
MOTION TO RECONSIDER ORDER NUNC PRO TUNC**

AT&T Communications of the Southwest, Inc. ("AT&T") files this its Motion to Reconsider Order No. 445340, submitted in this cause October 4, 2000.

**Introduction and Background**

In Order No. 445180 (the "September 28 Order"), this Commission expressed its decision to approve Southwestern Bell Telephone Company's ("SWBT") proposed Oklahoma 271 Agreement ("O2A") and to recommend that the FCC approve SWBT's application for long-distance authority in this state.<sup>1</sup> In both cases, this Commission's decisions were expressly conditional. The September 28 Order set out several conditions that SWBT was required to accept in order to receive the Commission's approval of the

<sup>1</sup> AT&T takes exception to the Commission's decision to approve the O2A and to recommend approval of SWBT's 271 application on the current record in Oklahoma, even with the conditions added by the September 28 Order. AT&T reserves its opposition to this Commission's rulings for presentation to the FCC and in any other appropriate appeals, but has limited the present motion to the October 5, 2000 Nunc Pro Tunc order and, specifically, the change it would make to the September 28 Order regarding the point of interconnection issue.

O2A and of SWBT's 271 application.<sup>2</sup> From AT&T's perspective, those conditions are critical to the September 28 Order having any positive impact on local telephone service competition. It was those conditions that allowed Chairman Anthony to describe the Order as "balanced" and "demanding."

However, on October 3, 2000, AT&T, along with other parties in this cause, were notified by e-mail from Commission employee Geri Bowen as follows: "High Priority. Please be advised that an Amended Order in this Cause is set for signing agenda and/or deliberations on Wednesday, October 4, 2000, at 9:30 a.m." No explanation was given for the nature of the Amended Order. In fact, an e-mail from counsel for one of the parties to this cause to Ms. Bowen asking the reason for the amendment went unanswered. On that same day, the Commission posted on its 24-hour signing agenda an "Amended Order" in this cause. Phone calls with the Office of General Counsel Staff informed AT&T that the amendment dealt with Attachment 11 to the O2A, and that AT&T (and other parties) would have an opportunity to argue the issues associated with Attachment 11 of the O2A on October 4, 2000. At no time were any motions filed in this cause seeking an amendment to the order.

As part of the signing agenda on October 4, the Commission Secretary read the list of orders for signing, including an "Order Nunc Pro Tunc" in this cause. The Commissioners voted in favor of signing the order without any explanation of the nature of the order. Thereafter, Assistant Attorney General Cece Coleman asked the

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<sup>2</sup> The concluding language made explicit the conditional nature of the Commission's rulings: "[t]he Commission hereby approves the O2A *with the conditions and requirements set forth in this Order. With the changes to the O2A recommended by the Commission herein*, Southwestern Bell's entry into the Oklahoma long distance market will be in the public interest. The Commission therefore recommends approval to the FCC of Southwestern Bell's [271] application . . . , *provided Southwestern Bell makes the identified changes to the O2A and implements reporting requirements as set forth herein*. September 28 Order at 194 (emphasis added).

Commission to explain the purpose of the Order Nunc Pro Tunc, since she was not aware that such an order was scheduled for signing. She was told that the order would speak for itself and Commission staff then handed out copies of Order No. 445340, Order Nunc Pro Tunc Regarding Order No. 445180 (hereafter "Nunc Pro Tunc Order").

The Nunc Pro Tunc Order changed two paragraphs in the September 28 Order. The first change deleted the following paragraph on page 164 of the September 28 Order:

"The Commission finds that AT&T's concerns have merit and directs that Southwestern Bell's Attachment 11 be replaced with the Attachment 11 proposed by AT&T as Attachment 3 to its Comments on the O2A (Ex. 60c). The Commission finds that this O2A provision, as amended, fully complies with the FCC's single point of interconnection requirement."

In place of this paragraph, the Nunc Pro Tunc Order inserted the following language:

"The Commission finds that the additional language proposed in SWBT's Sparks Rebuttal Test., referenced above, is consistent with the FCC's decision in the Texas Order and that Southwestern Bell need not make additional changes to Attachment 11. The Commission finds that this O2A provision, as amended in accordance with SWBT's Sparks Rebuttal Test., fully complies with the FCC's single point of interconnection requirement."

A second change to the September 28 Order was also purportedly made in the Nunc Pro Tunc Order. The following paragraph from page 182 was deleted:

"The current decision from the Texas line splitting decision in the AT&T arbitration should be adopted as interim terms, conditions and rates for line splitting in Oklahoma."

The following language was inserted in place of the above language:

"Additionally, the decision, when adopted by the Texas Public Utility Commission, from the Texas line splitting docket (AT&T arbitration, Texas PUC Docket No. 22315) should be adopted as interim terms, conditions and rates for line splitting in Oklahoma."

**The Nunc Pro Tunc Order Cannot be Used to Make  
Substantive Changes to the September 28 Order**

AT&T believes that both of these revisions described above constitute substantive, material changes to the September 28 Order which cannot be made by an Order Nunc Pro Tunc. These types of changes require notice and hearing, and an attempted change without notice and hearing violates fundamental notions of due process and is void on its face. *See Mullins v. Ward*, 1985 OK 109, 712 P.2d 55 (1985). In *Mullins*, mineral owners sued lessees to quiet title to the mineral estate, to secure an accounting for production, to assess damages for trespass and to cancel the lease. The Court noted that a critical issue in the case was the legal efficacy of a correction order issued by the Corporation Commission that postponed the effective date of a despadding order from December 3, 1976 to April 27, 1977. The Court noted that the lessees had to change the effective date of the despadding order through a nunc pro tunc order which was entered by the Commission without application, mailed notice or hearing.

The Supreme Court upheld the District Court's ruling that the order nunc pro tunc was facially void, holding at ¶ 8:

When acting in its adjudicative capacity, an administrative agency is subject to due process requirements not dissimilar to those which apply to judicial bodies. A nunc pro tunc order that materially affects the rights of a party is ineffective if it was issued without prior notice and hearing. We therefore hold that the ex parte correction order which sought to postpone the effective date of the agency's prior despadding order is facially void. Insofar as Corporation Commission Rule 26(c) is relied upon broadly to justify a noticeless correction process, it suffices to say that the rule may not be invoked when the correction or change to be proposed in the order will adversely affect a party's interests.

The Supreme Court further noted that when the Corporation Commission acts in an adjudicative capacity, it functions as a court and the general norms of law which govern



the notice that must be given in proceedings in a judicial tribunal, including minimum standards of federal and state due process, apply to the Commission. *Id.* at n. 8. Additionally, “the power to make corrections through a nunc pro tunc device extends only to clerical rather than judicial errors.” *Id.* at n. 9. Finally, the Court stated in n. 10:

Notice is required when an applicant seeks to repeal, amend, modify or supplement a former Commission order establishing a well spacing unit. ... It must be given in order to invest the Commission with jurisdiction to hear the issue. Want of notice is a violation of due process. ... When a spacing order is sought to be corrected in a nunc pro tunc proceeding by a provision that may adversely affect a party’s interest, advance notice and hearing are required. An administrative rule may not infringe on rights guaranteed by the constitution. [citations omitted]

Finally, the Court quoted the Commission rule on nunc pro tunc orders used to revise the despadding order. The rule, set forth in n. 11, provided:

Upon motion of any party, with or without notice or hearing, the Commission may make an order nunc pro tunc to correct any clerical errors, mistakes or omissions in an order, or otherwise to cause it to correctly reflect the judgment or action of the Commission.

The similarities between the facts in *Mullins* and the instant case are striking. In this case, no motion was filed, nor was any notice given of the action proposed to be taken.<sup>3</sup> No hearing was held prior to the order being entered. And the apparent authority relied upon by the Commission for its action is virtually identical to the Commission rule cited in *Mullins*. OAC 165:5-17-4 provides:

With or without notice or hearing, the Commission may make or cause to be made an order nunc pro tunc to correct any clerical errors,

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<sup>3</sup> The e-mail message from Ms. Bowen and the signing agenda notice both indicate that an “Amended Order” would be considered. An amended order suggests an order pursuant to OAC 165:5-17-1 which allows a party to file a motion to modify the order within 10 days after the order is entered. As noted above, no such motion was filed in this case. It is unclear whether the Commission decided sua sponte to issue an order nunc pro tunc, and if so, why it decided to abruptly reverse one of the significant conditions imposed upon SWBT in its original order, or whether one or more parties informally raised the issue with the Commission rather than follow the appropriate procedure of filing a motion and giving notice to all parties.

mistakes, or omissions in an order, or as to timely mailing of the order by the Commission or otherwise to cause the order to correctly reflect the judgment or action of such Commission.

In *Mullins*, the Court held that virtually identical language could not be used by the Commission to escape fundamental due process requirements of prior notice and hearing before revising an order in a manner that “materially affects the rights of a party.” Clearly, the change regarding SWBT’s Attachment 11 is a change which “materially affects the rights of a party.”<sup>4</sup> Moreover, the change “adversely affects a party’s interests” in this case. On the subject of Attachment 11, the September 28 Order plainly said that AT&T’s position wins, and SWBT’s loses; the Nunc Pro Tunc Order just as plainly would rule that SWBT’s position wins, and AT&T’s loses. Just as in *Mullins*, this Commission cannot rely upon its nunc pro tunc rule to make a change that has these effects. To do otherwise would infringe on rights guaranteed by the constitution.

*Mullins* compels the result that the Nunc Pro Tunc Order is facially void. Accordingly, AT&T requests that the Commission enter an order declaring that the Nunc Pro Tunc Order is void, and reinstating the conditions imposed in the September 28 Order in total.

**The Commission Should Reconsider Its Change of Position  
on the Point Of Interconnection Issue**

Procedural defects aside, AT&T requests that the Commission reconsider the change of position contained in the Nunc Pro Tunc Order with regards to the point of interconnection issue on substantive grounds. As stated above, from AT&T’s

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<sup>4</sup> Although SWBT is quoted in press accounts as contending that the change is “basically a clerical error” (see *The Daily Oklahoman*, October 5, 2000 at p. 8 C), it clearly is more than a clerical error. An examination of SWBT’s Attachment 11 and the one proposed by AT&T reveal major, material differences. No one could properly characterize the result of the nunc pro tunc order as a change which does not adversely affect the interests of CLECs supporting the change proposed by AT&T and originally adopted by the Commission.

perspective, the conditions contained in the September 28 Order, and in particular the condition regarding SWBT's interconnection requirements, are critical to the September 28 Order having any positive impact on local telephone service competition.

As established at the hearing, SWBT fails to provide interconnection in accordance with sections 251(c)(2) and 252(d)(1), at any technically feasible point, including tandem switches. Instead, SWBT's interconnection policies require a CLEC to establish a minimum of one point of interconnection ("POI") at each SWBT local tandem in which the CLEC intends to offer local service. Moreover, for each local exchange area that is not served by a local tandem switch, AT&T is required to establish a POI into that exchange via ordering SWBT facilities or building its own facilities. Once the POI is established, AT&T must additionally order trunk groups to every end office in that exchange. AT&T has requested the ability to establish a POI at the access tandem. SWBT refuses to permit AT&T to interconnect at the access tandems, even though such interconnection is technically feasible and more efficient for AT&T. SWBT's POI policy is inconsistent with the 1996 Act and the FCC's rules; it also forces additional cost on CLECs and is transferring virtually all of the transport cost to CLECs both for originating and terminating local calls. Ex. 148 at pp. 2-7; 9/20/2000 Tr. at 196. SWBT's unlawful interconnection regime hinders CLEC local entry plans, as well as creates a barrier to CLEC market entry. *Id.* at pp. 7-9, 14-17.

Even though SWBT proposed modified language to Attachment 11 of the O2A allowing a CLEC to establish a single point of interconnection within a LATA, see Ex. 80d at p. 15 (Sparks rebuttal) -- the language that the Nunc Pro Tunc Order would approve -- this modified language still threatens to impose discriminatory and unjustified

added trunking and transport costs on Oklahoma CLECs, as raised by AT&T during the hearing. Even under the revised language as proposed by SWBT to Attachment 11 of the O2A, as SWBT witness Mr. Deere testified, a CLEC that established a single point of interconnection within a LATA would still have to purchase common transport or dedicated transport to exchange local traffic from one local exchange area to another. 9/20/2000 Tr. at 196 (Deere cross). By requiring CLECs to continue to bear the costs of transport and termination of traffic to the incumbent's network, SWBT's proposed interconnection terms and conditions violates the requirements of the federal Act that a new entrant be able to select the "most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' costs of, among other things, transport and termination." *SBC Texas 271 Order* at p. 78; Ex. 148 at p. 7.

AT&T understands and agrees that, when it delivers a call originated by an AT&T local customer to a POI, AT&T will be required to compensate SWBT, through reciprocal compensation, for transporting and switching that call to a SWBT end user customer. The reverse should be true as well. When a SWBT customer calls an AT&T customer, and SWBT delivers the call to the appropriate POI, AT&T will carry the call to the AT&T end user, and AT&T should receive terminating compensation. SWBT's modified Attachment 11 language, however, with its reference to the CLEC purchasing additional transport on *SWBT's* side of the POI, would upset this balance, and would require the CLEC to pay for transport traffic originated by SWBT customers from certain central offices (those not subtended by a local tandem) to the POI. In short, SWBT wants CLECs to pay for transporting SWBT's originating traffic on SWBT's side of the POI. This is discriminatory and unjustified under the Act. Each party should be responsible –

financially and as a matter of engineering – for delivering its traffic to the POI, and reciprocal compensation should compensate each party for carrying the other’s traffic from the POI to the point of termination. SWBT – through the modified language that the Nunc Pro Tunc Order would approve – seeks to shift to the CLECs a substantial portion of SWBT’s responsibility for delivering its own traffic to the POI. The result would be to impose on CLECs the very same financial burden that would result if CLECs were required to establish a physical point of interconnection at each of these end offices.

As the Commission explicitly found in its September 28 Order, AT&T’s concerns about SWBT’s interconnection policies “have merit.” (September 28 Order at p. 164). SWBT’s proposed single point of interconnection language is meaningless if it continues to shift the costs of transport and termination of traffic on the CLEC. It was to remedy this situation that the Commission directed that SWBT replace its proposed O2A Attachment 11 with AT&T’s proposed Attachment 11, as AT&T understood the plain language of the September 28 Order.<sup>5</sup>

Because AT&T was not presented with an opportunity to present argument at the October 4 signing agenda in which the Nunc Pro Tunc Order was issued, AT&T is unaware of any specific concerns that the Commission might have with AT&T’s proposed Attachment 11. Neither has SWBT filed any testimony or comments in this proceeding reflecting its concerns with language contained in AT&T’s proposed

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<sup>5</sup> Because it was apparent to AT&T that most of the conditions added in the Order were not included in the O2A that was attached to that Order, AT&T saw no inconsistency between the very explicit language on page 164 of the Order directing SWBT to substitute AT&T’s proposed Attachment 11 into the O2A and the inclusion of SWBT’s proposed Attachment 11 in the O2A that accompanied the Order. The substitution of AT&T’s Attachment 11 was just one of many steps that remained to be taken after issuance of the September 28 Order. Establishing a procedure for verifying SWBT’s assent to the conditions stated in the September 28 Order and incorporating those conditions into the O2A is the subject of the Motion To Reconsider and Modify Order No. 445180, filed October 9, 2000 by AT&T and IP Communications.

Attachment 11. Certainly it has filed no motion for rehearing or reconsideration of this Commission's September 28 Order. SWBT has stated to the press that AT&T's proposed Attachment 11 addressed issues that were broader than just point of interconnection. AT&T believes that such an argument is a red herring and that the appropriate place for SWBT to have raised such a concern was in reply comments or testimony responding to AT&T's Comments on the O2A, or in a motion to reconsider the September 28 Order. However, to the extent that the Commission shares SWBT's concerns about the breadth of AT&T's proposed Attachment 11, AT&T has developed, as an alternative, a proposed modification to the original language of Attachment 11 of the O2A that addresses and resolves AT&T's concerns about transport and termination, but that would leave unchanged the remainder of SWBT's originally proposed Attachment 11. Because SWBT's proposed interconnection terms and conditions improperly shift the costs of transport and termination on to the CLEC in violation of the federal Act, SWBT should be required to modify section 1.1 of Attachment 11: Network Interconnection Architecture of the O2A as follows:

"In each ~~SWBT exchange area~~ LATA in which CLEC offers local exchange service, the Parties will interconnect their network facilities at a minimum of one ~~mutually agreeable~~ Point of Interconnection (POI). CLEC may designate any technically feasible point on SWBT's network for such interconnection. Each party will be financially responsible for providing necessary equipment and facilities on its side of the POI, and each party will be responsible for engineering its network (i.e., the underlying facilities on which trunks are provisioned) on its side of the POI. Each party will deliver originating traffic to the POI at its own expense. Each party will deliver terminating traffic from the POI to the end-user and will receive appropriate compensation under Attachment 12. ~~If CLEC establishes collocation at an end office, any direct trunks will be provisioned over the CLEC collocation facility.~~ The POI will be identified by street address and Vertical and Horizontal (V & H) Coordinates. This process will

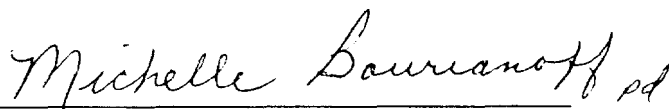
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TX area

continue as CLEC initiates exchange service operations in additional SWBT Exchange Areas."

### Conclusion

The conditions contained in the September 28 Order are important to the future of local telecommunications competition in this state. They were important enough for this Commission to add them in its Order. They cannot and should not be set aside through the improper fiction of a Nunc Pro Tunc Order. Accordingly, AT&T requests that the Commission set aside the Nunc Pro Tunc, for both substantive as well as procedural grounds, and reinstate the September 28 Order, in accordance with the modifications requested by AT&T and IP Communications in their October 9 Motion to Reconsider and Clarify Order No. 445180. Alternatively, AT&T requests that the Commission set aside the Nunc Pro Tunc Order and require SWBT to include in the O2A the modifications to Attachment 11 discussed above, in order to retain this Commission's approval of the O2A and its favorable recommendation on SWBT's 271 application.

Respectfully submitted,

A handwritten signature in cursive script, reading "Michelle Bourianoff", followed by a small mark that appears to be "pd".

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## CERTIFICATE OF SERVICE

On this 16<sup>th</sup> day of October, 2000, a true and correct copy of the foregoing was mailed, postage prepaid to:

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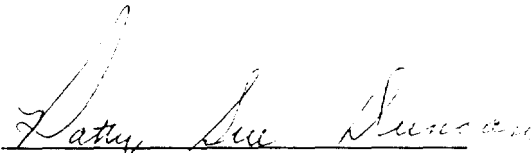
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**ATTACHMENT 6**

*to the*

**DECLARATION OF EVA FETTIG  
ON BEHALF OF  
AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.**

### **Procedural History**

In the above styled Cause, Southwestern Bell Telephone Company ("Southwestern Bell" or "SWBT") seeks permission to provide in-region, interLATA services in Oklahoma under section 271 of the Federal Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("the 1996 Act"). Section 271(d)(2)(B) of the Act provides that the Federal Communications Commission ("FCC") shall consult with the appropriate state commission before ruling on the application of any Bell Operating Company ("BOC") to provide in-region, interLATA services.

On September 28, 2000, the Commission issued Order No. 445180, which recommended approval of SWBT's Section 271 Application to the FCC, provided certain requirements were met by SWBT. Thereafter, on October 4, 2000, the Commission issued Order Nunc Pro Tunc No. 445340, which corrected mistakes of the Commission in Order No. 445180.

On October 9, 2000, Sprint Communications Company L.P. ("Sprint") filed a Motion to Declare Order Nunc Pro Tunc as Void and Motion for Reconsideration. Sprint alleged that the revisions made in the Order Nunc Pro Tunc are substantive, material changes which cannot be made by an Order Nunc Pro Tunc, but instead require notice and the opportunity for hearing. Sprint further alleged that an attempted change without notice and hearing violates fundamental notions of due process and is void on its face. Sprint further requested that Order No. 445180, the Order issued on September 28, 2000, be declared void because of various alleged *ex parte* communications. Sprint further alleged that Sprint and other parties failed to receive adequate notice of all of the issues to be heard in this cause, including *inter alia*, performance measures.

On October 9, 2000, AT&T Communications of the Southwest, Inc. ("AT&T") and IP Communications Corporation ("IP") jointly filed a Motion to Reconsider and Clarify Order No. 445180. The Motion requested clarification of Order No. 445180 and modification of the O2A attached to it for two reasons: first, to assure that SWBT has accepted all of the conditions included in the order, and second, to provide that the form

of the O2A that SWBT will offer to Oklahoma CLECs incorporates all of the relevant conditions.

On October 9, 2000, Cox Oklahoma Telcom, L.L.C. ("Cox") filed a Motion to Modify Order No. 445180. Cox alleged that Order No. 445180 contains several incorrect findings regarding the existence of facilities based competition in Oklahoma. Cox specifically disagreed with a statement in the Order, which indicates that Logix and Brooks-Fiber are providing service to residential customers.

On October 16, 2000, AT&T filed a Motion to Reconsider Order Nunc Pro Tunc No. 445340. The Motion alleged that the changes made by the Order Nunc Pro Tunc affect AT&T's rights in a substantive, material way, and that Order No. 445340, therefore, violates AT&T's right to due process. The Motion further requested that the Commission reconsider its position on the point of interconnection issue (Attachment 11). AT&T's position is that by requiring CLECs to continue to bear the costs of transport and termination of traffic to the incumbent's network, SWBT's interconnection terms and conditions violate the requirements of the 1996 Act.

On October 16, 2000, the Attorney General of the State of Oklahoma filed a Motion to Set Aside Nunc Pro Tunc Order No. 445340 as Void ("Motion"). The Attorney General alleged that the changes accomplished by the issuance of Order No. 445340 are substantive in nature, materially affect the interests of the parties to this cause, and go beyond what would normally be construed as correcting a clerical error, mistake, or omission. The Attorney General further alleged that Order No. 445340 is void for lack of due process to the affected parties. The Attorney General's Motion also raised *ex parte* concerns.

On October 16, 2000, Cox filed an Objection to Order Nunc Pro Tunc Regarding Order No. 445180. Cox alleged that the amendments made in Order Nunc Pro Tunc No. 445340 were not made to correct clerical errors, mistakes or omissions, but were instead, material and substantive changes. Cox further alleged that because the Order Nunc Pro Tunc was not issued pursuant to prior notice and hearing, the Order Nunc Pro Tunc is therefore invalid and should be stricken.

On October 16, 2000, SWBT filed its Response to the Post Hearing Motions Filed on October 9, 2000, by Cox Oklahoma Telcom, Sprint Communications Company, L.P., AT&T Communications of the Southwest, Inc. and IP Communications Corporation. In response to Cox's Motion to Modify Order No. 445180, SWBT stated that the evidence supporting the Commission's findings regarding the provision of residential service by both Brooks Fiber and Logix Communications was uncontroverted. In response to Sprint's Motion to Declare Order Nunc Pro Tunc as Void and Motion for Reconsideration, SWBT argued that OAC 165:5-17-4 allows the Commission to do exactly what it did in the Order Nunc Pro Tunc; that is, to correct a mistake in Order No. 445180. In response to Sprint's Motion for Reconsideration, SWBT argued that those issues have been argued and ruled upon previously. In response to AT&T/IP's Motion to Reconsider and Clarify Order No. 445180, SWBT stated that it has already made the O2A available, and has agreed to abide by the conditions imposed by the Commission. SWBT further stated that it had issued an accessible letter notifying CLECs of the availability of the O2A, and stands ready to implement such agreements when accepted by CLECs. SWBT further stated that it will accept the changes proposed by AT&T to the following sections: Appendix Pricing UNE-Exhibit 1, Attachment 17: Performance Remedy Plan, and Attachment 26: Legitimately Related Provisions.

On October 17, 2000, SWBT filed its Response to the Post Hearing Motions filed on October 16, 2000, by the Attorney General, Cox Oklahoma Telcom and AT&T Communications of the Southwest, Inc. SWBT argued that the procedural arguments contained in the October 16, 2000, post hearing motions should be summarily rejected for the reasons set out in its response of October 16, 2000. SWBT further objected to the request of AT&T and Cox that AT&T's Attachment 11 be adopted, arguing that no evidence exists to support the adoption, and further that there is no merit to the substantive arguments for the adoption.

### **Findings of Fact and Conclusions of Law**

The Commission, having reviewed the motions filed herein and having heard the arguments of counsel, finds as follows:

At the hearing on October 18, 2000, AT&T announced that the Response filed by SWBT on October 16, 2000, which sets forth a commitment to abide by the conditions imposed by the Commission in Order Nos. 445180 and 445340, satisfies the majority of the concerns and issues raised in the Motion to Reconsider and Clarify Order No. 445180 that was filed jointly by AT&T and IP. The Commission having reviewed the Response of SWBT finds that SWBT, with minor exceptions, has agreed to incorporate the language suggested by AT&T/IP in Attachment A to their Motion to Reconsider into the O2A. The Commission further finds that the modifications acquiesced to regarding Appendix Pricing UNE - Exhibit 1; Appendix Collocation; Attachment 17 - Performance Remedy Plan; Attachment 25 - xDSL and Interim Appendix HFPL; Attachment 26 - Legitimately Related Provisions; and the Appendix Oklahoma Alternative Regulation Transition Plan should be approved. SWBT is directed to modify the O2A to conform it to the requirements of Order No. 445180 and Order No. 445340, the agreements set forth by SWBT in its Response filed October 16, 2000, and the statements made by counsel for SWBT during the October 18, 2000, hearing. Additionally, SWBT shall move the language regarding line splitting from Appendix HFPL to a separate, optional Line Splitting Appendix. SWBT shall file the amended O2A, which conforms to this Commission's orders, in the Commission's Court Clerk's office, no later than the close of business on October 24, 2000. Additionally, SWBT shall provide the revised O2A to the parties in this Cause electronically, along with a paper copy if a party requests a paper copy. SWBT shall also make the revised O2A available from SWBT's web site, no later than October 24, 2000.

Cox filed its Motion to Modify Order No. 445180 on October 9, 2000. In this motion, Cox sought to "correct" the findings set forth in Order No. 445180, to delete references to residential customers being served in Oklahoma by facilities based

carriers other than Cox. The Commission finds that the statement regarding residential customers being served by facilities based carriers in Order No. 445180, was based on the prefiled testimony of SWBT witness Mark Johnson. Since Mr. Johnson filed his prefiled testimony on June 9, 2000, and Cox neither sought to cross-examine Mr. Johnson or to present testimony during the hearing that would refute Mr. Johnson's testimony, the Commission finds that Cox's objection is not timely and should be denied.

Sprint also filed a Motion for Reconsideration. This motion requested that the Commission set aside Order No. 445180, and initiate a new docket to address both performance measure issues and the O2A; conducting the docket as a judicial proceeding with specific *ex parte* rules. The Commission finds that there is sufficient evidence in the record to support its findings in Order No. 445180 regarding performance measures and SWBT's compliance with those measurements. Additionally, it is anticipated that performance measures will continue to be updated periodically in the future and any concerns Sprint has regarding one or more specific performance measures may be addressed at that time. With regard to the suggestion of Sprint that the Commission conduct future proceedings concerning performance measures and the O2A as judicial proceedings, with identified *ex parte* rules, the Commission finds that each cause must be identified as either legislative or judicial, based upon the unique facts in that cause. Therefore, it is premature to identify at this time, any future causes regarding performance measures or the O2A as being either legislative or judicial in nature.

Sprint, Cox, AT&T and the Attorney General filed motions that sought to declare Order Nunc Pro Tunc No. 445340 to be void. The Commission finds that Order Nunc Pro Tunc No. 445340 merely corrected some mistakes of the Commission in Order No. 445180 and that the Order Nunc Pro Tunc reflects the intent of the Commission based upon the record and is procedurally consistent with the Commission's Rules of Practice. Additionally, the parties were given the opportunity to be heard regarding the merits of the corrections set forth in the Order Nunc Pro Tunc, at the time the motions to set



aside the Order were argued to the Commission on October 18, 2000. Therefore, the Commission finds that any due process concerns of the parties have been "cured" by their opportunity to argue the merits of the corrections made by the Order Nunc Pro Tunc.

Further, the Commission expressly rejects the allegations of the parties regarding *ex parte* communications in this Cause. Having considered the pleadings of the parties and the arguments of counsel, the Commission remains unpersuaded by the arguments in support of setting aside the Order Nunc Pro Tunc. Accordingly, the Commission reaffirms Order Nunc Pro Tunc No. 445340 as being the decision of the Commission regarding Attachment 11 to the O2A and the interim terms and conditions for line splitting in Oklahoma. The Commission also reaffirms Order No. 445180 as being the decision of the Commission, except as expressly modified by Order 445340 and this Order.

The Commission is mindful that the O2A is a model interconnection agreement and that it could possibly be improved if the parties were to work together to further refine the language in the O2A. Accordingly, the Commission directs the Commission Staff to schedule a technical conference, no later than Wednesday, October 25, 2000, wherein the parties and Staff may further discuss the O2A. Staff shall file with the Commission, no later than October 26, 2000, a report regarding this technical conference.

The Commission further finds that to facilitate the Commission in making a recommendation to the FCC, SWBT shall, at the time of filing with the FCC, provide a copy of SWBT's FCC filing to the Public Utility Division of the Commission. Said copy may be provided either electronically or in hard copy, or a combination of electronic and hard copy.

### **ORDER**

IT IS THEREFORE THE ORDER OF THE OKLAHOMA CORPORATION COMMISSION that the foregoing findings are hereby adopted and are the Order of the Commission.

IT IS FURTHER THE ORDER OF THE COMMISSION that all motions to declare Order Nunc Pro Tunc No. 445340 as void are hereby denied and the Commission reaffirms Order Nunc Pro Tunc No. 445340.

IT IS FURTHER ORDERED that SWBT shall modify the O2A to conform it to the requirements of Order Nos. 445180 and 445340, its Response filed October 16, 2000, and to the statements of counsel for SWBT during the hearing on October 18, 2000, and to move line splitting terms and conditions from the HFPL appendix to a new, optional appendix for Line Splitting. The conformed O2A is to be filed in the Court Clerk's office no later than the close of business October 24, 2000, with copies provided to the parties and to CLECs as set forth above.

IT IS FURTHER ORDERED that the Staff shall conduct a technical conference regarding the O2A. Said technical conference shall be concluded no later than October 25, 2000, and Staff shall file a report with the Commission regarding the technical conference, no later than October 26, 2000.

IT IS FURTHER ORDERED that SWBT shall promptly provide the Public Utility Division staff a copy of their Section 271 filing at the FCC, at the time filing is made.

OKLAHOMA CORPORATION COMMISSION

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BOB ANTHONY, Chairman

*Denise A. Bode*

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DENISE A. BODE, Vice Chairman

*Ed Apple*

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ED APPLE, Commissioner

DONE AND PERFORMED THIS 20 DAY OF OCTOBER, 2000, BY ORDER OF  
THE COMMISSION

*Peggy Mitchell*  
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PEGGY MITCHELL, Secretary